Supreme Court, U.S.
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IN THE

Supreme Court of the United States

D. CLARK OGLE, LIQUIDATING TRUSTEE
OF THE AGWAY LIQUIDATING TRUST,

Petitioner,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Agway, Inc. and Respondent entered into a contract that included a provision requiring Agway, Inc. to reimburse Respondent for its attorneys' fees incurred in connection with the enforcement of its rights under that contract.

After Agway, Inc. filed for protection under Chapter 11 of the Bankruptcy Code, Respondent incurred attorneys' fees in excess of $800,000 and sought to include those fees as part of its pre-petition unsecured claim.

Petitioner, as the trustee of the Agway Liquidating Trust established under Agway, Inc.'s confirmed Chapter 11 Plan of Liquidation, objected to so much of the claim as represented attorneys' fees incurred after the Chapter 11 petition date.

In allowing those post-petition fees as part of Respondent's unsecured pre-petition claim, the Second Circuit Court of Appeals found that the Court's decision in *Travelers v. Pacific Gas & Electric* indicated that this Court would allow such a claim and that the *Travelers* decision did not warrant a departure from the Second Circuit's decision in *United Merchants*.

The question presented is:

Whether the Court should grant certiorari to determine whether a general unsecured creditor in a bankruptcy case should be permitted to include post-petition attorneys' fees as part of its pre-petition claim.

The question presented, if answered by the Court, would resolve a conflict among the Circuits (and multiple lower courts) and would also resolve an important and recurring question of federal law that the Court declined to answer in *Travelers v. Pacific Gas & Electric.*

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is D. Clark Ogle, the trustee appointed to administer the Agway Liquidating Trust established under the confirmed Chapter 11 Liquidating Plan of Agway, Inc. Agway, Inc. was an agricultural cooperative owned by approximately 69,000 farmer-members. No entity owned 10% or more of Agway, Inc.'s stock.

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OPINIONS BELOW

The Memorandum-Decision and Order of the United States Bankruptcy Court for the Northern District of New York may be found at:

> *In re Agway, Inc., 2008 Bankr. LEXIS 3597 (Bankr. N.D.N.Y. July 18, 2008).*

The Memorandum-Decision and Order of the United States District Court for the Northern District of New York, on appeal from the United States Bankruptcy Court for the Northern District of New York, may be found at:

> *Ogle v. Fid. & Deposit Co., 2009 U.S. Dist. LEXIS 1595 (N.D.N.Y Jan. 12, 2009).*

The Opinion of the Second Circuit Court of Appeals (the "Decision" or "Ogle"), on appeal from the United States District Court for the Northern District of New York, may be found at:

> *Ogle v. Fid. & Deposit Co., 586 F.3d 143 (2d Cir. 2009).*

The opinions of the Second Circuit Court of Appeals, United States District Court for the Northern District of New York, and the United States Bankruptcy Court for the Northern District of New York are also attached at Petition Appendices A, B and C, respectively.

STATEMENT OF JURISDICTION

The Second Circuit Court of Appeals entered its judgment on November 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

11 U.S.C. §§ 101(5), 501, 502 and 506 are relevant to the petition, and are reproduced in Petitioner's Appendix, at Pet. App. D.

STATEMENT OF THE CASE

Agway's Bankruptcy Case and F&D's Claim

On October 1, 2002 (the "Petition Date"), Agway and several of its subsidiaries filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. For many years prior to the Petition Date, F&D had provided surety bonds to collateralize Agway, Inc.'s ("Agway") obligations under a series of insurance policies issued by third party insurers. The bonds were required by the insurers as a condition to the issuance of "large deductible" insurance policies issued to Agway. Under the large deductible policies, Agway was liable for the first $1 million of liability for each claim, with the respective insurance company indemnifying Agway for liability in excess of the $1 million deductible. If Agway were unable or unwilling to pay the "first" $1 million in liability, the insurance company would have the security of an F&D bond to satisfy Agway's abrogated obligation. F&D issued the bonds on Agway's behalf on an unsecured basis. The agreement between F&D and

Agway pursuant to which the bonds were issued (the "Program Agreement") required Agway to reimburse F&D for all amounts paid by F&D on Agway's behalf, as well as for all costs and expenses, including attorneys' fees, incurred by F&D in enforcing its rights under the Program Agreement.

As of the Petition Date, Agway was not in default of any of its obligations to its insurance companies or with respect to its obligations to F&D under the Program Agreement. After the Petition Date, however, Agway ceased making payments on account of certain insured claims, causing the insurance companies to make payments on behalf of Agway and then to seek reimbursement from F&D under the bonds. In addition to making payments under the bonds, F&D incurred attorneys' fees in excess of $800,000 during the administration of Agway's bankruptcy case.

F&D filed a series of proofs of claim during Agway's case, asserting claims for the amounts paid under the bonds, plus post-petition interest and post-petition attorneys' fees. An amendment to the proof of claim dropped the portion of the claim seeking post-petition interest, but continued to assert a claim for post-petition attorneys' fees.

Agway's Chapter 11 Liquidation Plan was confirmed by the bankruptcy court on April 28, 2004. Pursuant to the Plan, D. Clark Ogle ("Ogle") was appointed as the trustee of the Agway Liquidating Trust which was established to liquidate Agway's remaining assets, resolve outstanding claims and distribute the asset proceeds among the holders of allowed unsecured

claims. To date Ogle has made distributions equal to 71% of allowed unsecured claims. He anticipates that distributions equal to approximately another 4% will be made to holders of allowed unsecured claims. Agway is insolvent, however, such that there is no possibility that unsecured creditors will be paid in full.

Ogle filed an objection to F&D's proof of claim, including but not limited to the portion of the claim representing F&D's post-petition attorneys' fees. Ogle and F&D resolved the objection to the portion of the claim representing amounts paid by F&D on its bonds but did not resolve the objection to the attorneys' fees. Ogle did not dispute the amount of the attorneys' fees F&D sought to recover, and acknowledges that the fees would be recoverable were Agway not in bankruptcy. The sole basis for the objection to the attorneys' fees component of the F&D claim is Ogle's assertion that the Bankruptcy Code prohibits unsecured creditors from including post-petition attorneys' fees as part of their general unsecured claim.

In the decisions below, the Second Circuit Court of Appeals affirmed the district court, which had affirmed the bankruptcy court, and held that F&D is entitled to have its post-petition attorneys' fees claim included in its allowed general unsecured claim.

In affirming the lower court decisions, the Second Circuit held that "*Travelers* . . . reasonably extended, would suggest (notwithstanding the Court's express disclaimer) that section 502(b)'s requirement that the court "shall determine the amount of such claim . . . as of the date of the filing of the petition" — does not bar

recovery of post-petition attorneys' fees." *D. Clark Ogle v. Fidelity & Deposit Company of Maryland*, 586 F.3d 143, 147 (2nd Cir. 2009); Pet. App. at 10a.

REASONS FOR GRANTING THE PETITION

As the Second Circuit recognized in its decision:

> Courts are closely divided on the question presented. One line of cases holds that an unsecured claim for post-petition attorneys' fees asserted on the basis of a pre-petition contract is allowable. *See, e.g., In re SNTL Corp., 571 F.3d 826, 839-45 (9th Cir. 2009)* ("*SNTL*"); *Martin v. Bank of Germantown, 761 F.2d 1163, 1168 (6th Cir. 1985)*. Another line of cases holds that such a claim is disallowed. *See, e.g., Adams v. Zimmerman, 73 F.3d 1164, 1177 (1st Cir. 1996)*; *Waterman v. Ditto, 248 B.R. 567, 573 (B.A.P. 8th Cir. 2000)*.

Ogle at 145-6; Pet. App. at 6a.

A decision from this Court (and absent Congressional action, only a decision from this Court) will resolve the split among the Circuits and remedy the intolerable disparate treatment that claims for post-petition attorneys' fees currently receive in courts across the country.

A. The Split Is Fully Developed

The Decision reinforces a well developed split among the Circuits concerning whether a claim for post-petition attorneys' fees is allowed to general unsecured creditors and is at odds with the Court's holding in *Randolph v. Scruggs*, 190 U.S. 533 (1903).

The Second Circuit's decision in *Ogle* is consistent with the decisions of the Ninth Circuit in *SNTL Corp.* and the Sixth Circuit in *Martin Bank* (both courts allowed unsecured creditors to include post-petition attorneys' fees as part of their pre-petition claim), but is at odds with the holdings of the First Circuit in *Adams*[1] and the Eighth Circuit Bankruptcy Appellate Panel in *Waterman*.

The split is fully developed, with the majority of courts that address the question having analyzed essentially the same points in reaching their decisions. In describing the split of authority, the Ninth Circuit Bankruptcy Appellate Panel observed in its *SNTL Corp.* decision (issued after this Court's *Travelers* decision):

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1. Although *Adams* is correctly cited by the Second Circuit for the proposition that the First Circuit would disallow an unsecured creditor's claim for post-petition attorneys' fees, *Adams* actually involved a claim by an unsecured creditor seeking post-insolvency attorneys' fees in a bank liquidation under Title 12 of the United States Code. In discussing the analogy between a claim made under Title 12 with a claim under Title 11, the First Circuit did clearly state that claims by unsecured creditors in bankruptcy cases for ". . . post-petition attorneys' fees are generally not allowed. . . ." *Adams* at 1177.

> While the holdings may diverge, these cases analyze the four primary arguments in favor of and against the allowance of such claims: whether section 506(b) operates to disallow such claims; whether section 502(b) disallows such claims because they were not fixed "as of the date of the filing of the petition;" whether the Supreme Court's decision in *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc's., Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed. 2d 740 (1988), precludes allowance of such claims; and whether public policy favors disallowance of such claims.

In re SNTL Corp., 380 B.R. 204, 218 (B.A.P. 9th Cir. 2007).[2]

Moreover, these very points were extensively argued before this Court during the oral argument of *Travelers*, although the arguments and issues were ultimately not dispositive in that case.

The decision is also at odds with the Court's holding in *Randolph v. Scruggs*, 190 U.S. 533, 23 S.Ct. 710, 47 L.Ed. 1165 (1903) (an issue also discussed, albeit briefly, during the *Travelers* argument.)

In *Randolph v. Scruggs*, the Court was asked to determine whether to allow attorneys' fees incurred in connection with the preparation of an assignment for the benefit of creditors prior to the filing of an

2. The Ninth Circuit adopted the BAP's opinion as its own and attached the BAP decision as an appendix to its decision. *See, SNTL* Corp., 571 F.3d at 829.

involuntary bankruptcy case, as well as fees incurred in opposing the involuntary bankruptcy case commenced after the assignment had been effected.

The Court allowed the claim for pre-petition attorneys' fees as an unsecured claim, but denied the allowance of an unsecured claim for post-petition attorneys' fees. The post-petition attorneys' fees were not rejected because they were contingent as of the date of the adjudication of the bankruptcy (the bankruptcy act in force at the time disallowed claims that were not due and absolutely owing as of the petition date), but because the applicant had not demonstrated any benefit to the estate from the services rendered. *Id.* at 539-40.

Not only is there a split (as described in footnote 1, either actual or in principle) among the Circuits, none of the decisions consider the impact of *Randolph v. Scruggs* which disallowed post-petition attorneys' fees absent a demonstrated benefit to the bankruptcy estate.

B. The Decision Concerns An Important Federal Issue That Should Be Uniformly Interpreted

The Decision adopts one of the two conflicting positions on an important Federal statute that should be, but is not interpreted uniformly in bankruptcy courts across the country. Uniformity may only be provided by a decision from the Court or clarification from Congress.

Whether an unsecured creditor may include post-petition attorneys' fees as part of its pre-petition claim is an issue that bankruptcy courts are faced with every day and one that has generated multiple diverging

decisions. *See*, Brubaker, *Allowance of Attorney's Fees to an Unsecured Creditor (Part II): Wrestling with the Issue Undecided by the Supreme Court*, Bankruptcy Law Letter Vol. 27, No. 8 (August 2007), fns. 25 and 26 (collecting 16 cases disallowing and 12 cases allowing such fees). Under the current state of the law, bankruptcy courts in the Second, Sixth and Ninth Circuits are required to allow the post-petition attorneys' fees, while courts in First and Eighth Circuit should disallow the claim. Courts in the Western District of Kentucky, the Northern District of Georgia, the Eastern District of Tennessee, the Western District of Arkansas, the Northern District of Texas and the Western District of Wisconsin have allowed a claim for such attorneys' fees (*see*, Brubaker, cases listed at fn. 26), while courts in the Western District of Pennsylvania, the District of Colorado, the Western District of Virginia, the Northern District of Texas, the District of Delaware, Western District of Texas, the District of Maryland, the Southern District of Florida, the Northern District of Ohio, the Eastern District of Michigan, the Southern District of Texas, the Middle District of Florida, the Northern District of Georgia and the District of Kansas have all disallowed such a claim for post-petition attorneys' fees. *See*, Brubaker, cases listed at fn. 25.

Until it is resolved, the split among the Circuits will create situations that are antithetical to the establishment of ". . . uniform Laws on the Subject of Bankruptcies throughout the United States." U.S. Const., Article I, § 8. cl. 3. The varied interpretations to the question will lead to debtors with venue options seeking to file their cases in a district where such attorneys' fees are not allowed, Chapter 13

debtors who file in districts where post-petition attorneys' fees are allowed will bear the additional financial burden of such attorneys' fees, creditors' claims will be allowed in differing amounts based solely on the venue in which a debtor's case is filed, and unsecured creditors' claims in districts that allow such attorneys' fees will be impaired by the amount of such allowed attorneys' fees.

The issue has also spawned a number of law review and similar articles. Not surprisingly, the authors of those articles also diverge as to whether the Court will (and should) allow an unsecured creditor's claim for post-petition attorneys' fees. *See*, Taylor & Mertens, *Travelers and the Implications on the Allowability of Unsecured Creditors' Claims for Post-Petition Attorneys' Fees Against the Bankruptcy Estate*, 81 Am. Bankr. L.J. 123 (Spring 2007) (predicting that the Court would disallow such a claim); Roe, *The Aftermath of Travelers v. PG&E, Attorneys' Fees Recovery in Bankruptcy*, American Bar Association Tort Trial & Insurance Practice Section, Fidelity & Surety Law Committee Newsletter, Fall 2007 (suggesting that *Travelers* indicates that the Court would allow such a claim); Scarberry, *Interpreting Bankruptcy Code Sections 502 & 506: Post-Petition Attorneys' Fees In A Post-Travelers World*, 15 American Bankr. L. R. 611 (2007) (arguing that the clear language of Sections 502 and 506 does not permit the allowance of post-petition attorneys' fees to unsecured creditors).

C. The Decision Below Was Decided Incorrectly And Renders Other Provisions Of The Bankruptcy Code Superfluous.

Petitioner respectfully submits that in addition to incorrectly deciding the four prongs typically analyzed by courts (see discussion of *SNTL Corp.* above), the *Ogle* decision renders several provisions of the Bankruptcy Code superfluous and thus in conflict with this Court's ". . . deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment. *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990), *citing*, *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988).

By adopting such an expansive meaning of "contingent claim" to allow post-petition attorneys' fees under Section 502, the Second Circuit (and all other courts that come to the same conclusion) have effectively rendered Sections 502(e)(2), (g), (h) and (i), as well as Section 506(b) superfluous.

The *Ogle* decision held that creditors with a pre-petition contract including an attorneys' fee provision hold a contingent claim for post-petition attorneys' fees on the date of the petition that is not disallowed by any sub-part of Section 502. If in fact any post-petition event relating to a pre-petition contract or event is simply considered to be a contingent claim as of the petition date that is allowable when the contingency later occurs, then there is simply no purpose served by Sections 502(e)(2) (providing for the allowance of indemnity claims as of the petition date notwithstanding that such claim became fixed post-petition), 502(g) (providing that a

claim arising from the post-petition rejection of an executory contract or unexpired lease shall be allowed as of the petition date), 502(h) (providing that a claim arising from the post-petition recovery of property arising out of an avoidable pre-petition transaction shall be allowed as of the petition date), and 502(i) (providing that certain tax liabilities determined post petition but relating to pre-petition tax periods, shall be allowed as of the petition date).

Under the construct established in the *Ogle*, the post-petition claims specifically allowed as of the petition date pursuant to Sections 502(e)(2), (g), (h) and (i) would already be allowed within the definition of "contingent claim". Those specifically enumerated exceptions to the mandate of Section 502(b) to determine a claim "as of the date of the filing of the petition" would be rendered entirely superfluous.

The expansive definition of "contingent claim" adopted in *Ogle* also renders Section 506(b) superfluous insofar as it deals with the allowance of attorneys' fees to an oversecured creditor.

As *Ogle* allows an unsecured creditor's claim for post-petition attorneys' under Section 502(b), then a secured creditor's allowed claim must also include post-petition attorneys' fees (Section 502 makes no distinction between secured or unsecured claims.)

As the secured creditor's allowed Section 502 claim includes post-petition attorneys' fees, under Section 506(a)(1), the claim will be a secured claim to the extent of the value of the collateral. "An allowed claim of a

creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . . ." 11 U.S.C. § 506(a). If the allowed claim (including attorneys' fees) is already secured to the extent of the value of the collateral, then Section 506(b), to the extent that addresses attorneys' fees, is superfluous:

> To the extent that an allowed secured claim is secured by property the value of which . . . is greater that the amount of such claim, there shall be allowed to the holder of such claim . . . any reasonable fees . . . provided for under the agreement or State statute under which such claim arose.

Only if Section 502 is read to fix the amount of claims as of the date of the filing of the petition, except where specifically excepted, and thus excluding the allowance of post-petition attorneys' fees, do Sections 502(b), (e)(2), (g), (h) and (i), and Sections 506(a) and (b) work in harmony. When Section 502 is read to allow post-petition attorneys' fees, the referenced sections become redundant and illogical.

> Because post-petition fees are not allowed by Section 502(b) but rather by Section 506(b), we are left with the clear conclusion that post-petition fees cannot be allowed in favor of undersecured creditors or wholly unsecured creditors, neither of whom receive any benefit from Section 506(b). That conclusion establishes, as a matter of the plain meaning of Sections 502(b), 506(a) and 506(b), as they deal with claims, that post-petition fees are not

> allowable on unsecured claims. It establishes the correctness of the "majority" view.

Scarberry, *Interpreting Bankruptcy Code Sections 502 & 506: Post-Petition Attorneys' Fees In A Post-Travelers World* at 651.

D. Alternatively, The Court Should Grant Summary Reversal

Because the decision below is plainly in error, the Court may find it appropriate to consider summary reversal. Accordingly, pursuant to Supreme Court Rule 16.1, Petitioner respectfully moves for summary reversal of the decision below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should grant the petition for writ of certiorari. Alternatively, Petitioner requests summary reversal.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED NOVEMBER 5, 2009

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Argued : October 15, 2009
Decided: November 5, 2009)

Docket No. 09-0691-bk

D. CLARK OGLE, Liquidating Trustee of the Agway Liquidating Trust,

Appellant,

- v.-

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Appellee.

Before: JACOBS, *Chief Judge*, FEINBERG and KATZMANN, *Circuit Judges.*

The United States District Court for the Northern District of New York (Sharpe, *J.*), affirming a judgment of the United States Bankruptcy Court for the Northern District of New York (Gerling, *C.J.*), ordered the Agway Liquidating Trust to pay post-petition attorneys' fees on a claim that stemmed from a pre-petition indemnity agreement. The liquidating trustee, D. Clark Ogle,

appeals, arguing that the federal Bankruptcy Code ("Code") bars unsecured claims for post-petition attorneys' fees.

In *United Merchants & Manufacturers, Inc. v. Equitable Life Assurance Society of the United States*, 674 F.2d 134 (2d Cir. 1982), this Court held, under the Bankruptcy Act then current, that such claims are allowable. In *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443, (2007), the Supreme Court rejected a Ninth Circuit rule disallowing such claims if the fees were incurred litigating issues of bankruptcy law, but reserved decision on the precise question presented on this appeal: whether such claims are allowable categorically. We conclude that the holding of *United Merchants* has not been impaired by *Travelers* or by statutory revisions.

For the reasons that follow, we affirm the judgment of the district court.

Appendix A

DENNIS JACOBS, Chief Judge:

The federal Bankruptcy Code ("Code"), 11 U.S.C. §§ 101 *et seq.*, does not explicitly state whether an unsecured creditor can collect *post-petition* attorneys' fees based on a *pre-petition* indemnity agreement. In *United Merchants & Manufacturers, Inc. v. Equitable Life Assurance Society of the United States*, 674 F.2d 134 (2d Cir. 1982), this Court held, under the Bankruptcy Act then current, that such claims are allowable. In *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007), the Supreme Court rejected a Ninth Circuit rule disallowing such claims if the fees were incurred litigating issues of bankruptcy law, but reserved decision on the precise question presented on this appeal: whether such claims are allowable categorically. We conclude that the holding of *United Merchants* has not been impaired by *Travelers* or by statutory revisions.

Fidelity & Deposit Company of Maryland ("Fidelity") entered into several agreements ("the Agreements") with Agway, Inc. which required Agway to indemnify Fidelity for attorneys' fees that it might incur to enforce the Agreements against Agway. After Agway filed for bankruptcy under Chapter 11, Fidelity duly made payments to Agway's creditors, unsuccessfully demanded indemnity under the Agreements, and incurred attorneys' fees in litigation to collect from Agway. Only those attorneys' fees are at issue on this appeal. The liquidating trustee of the Agway Liquidating Trust ("the Trust"), D. Clark Ogle ("Ogle"), concedes

that Fidelity has a right to the fees under state contract law, but refuses to pay on the ground that the Code bars such recovery.

The United States Bankruptcy Court for the Northern District of New York (Gerling, C.J.) held that Fidelity can collect $884,506.28 in post-petition attorneys' fees. The United States District Court for the Northern District of New York (Sharpe, J.) affirmed. Ogle appeals that decision. We affirm, concluding that the Code does not prohibit an unsecured creditor from collecting post-petition attorneys' fees pursuant to an otherwise enforceable pre-petition contract of indemnity.

I

Pursuant to the Agreements, Fidelity provided surety bonds ("Bonds") to Agway's insurers, and Agway in turn agreed to indemnify Fidelity for any payments that it made under the Bonds as well as legal fees incurred to enforce the Agreements. On October 1, 2002, Agway filed a voluntary Chapter 11 bankruptcy petition. Up until then, Agway had not defaulted on any payment obligation to its insurers; Fidelity's claim in bankruptcy therefore asserted no more than a contingent right to payment under the Agreements.

When Agway thereafter defaulted on payments to its insurers, the insurers in turn sought payment from Fidelity, and Fidelity tendered payment consistent with its obligations under the Bonds. Fidelity incurred

additional costs, including legal fees, enforcing its indemnity rights against Agway in prolonged litigation. On July 18, 2008, the Bankruptcy Court concluded (as relevant here) that Agway was liable for Fidelity's post-petition attorneys' fees.

The parties thereafter settled all of the issues between them *except* the order requiring payment of post-petition attorneys' fees. Ogle appealed that part of the bankruptcy court's order to the district court pursuant to 28 U.S.C. § 158(a), and the district court affirmed the bankruptcy court's order. Ogle now appeals to this Court.

The sole question on appeal is one of law: Under the Bankruptcy Code, is an unsecured creditor entitled to recover post-petition attorneys' fees that were authorized by a pre-petition contract but were contingent on post-petition events?

Where, as here, a district court affirms a bankruptcy court's decision, we independently review the decision of the bankruptcy court. *Adelphia Bus. Solutions, Inc. v. Abnos*, 482 F.3d 602, 607 (2d Cir. 2007). Our review of legal conclusions is *de novo*. *Id.*

II

Courts are closely divided on the question presented. One line of cases holds that an unsecured claim for post-petition attorneys' fees asserted on the basis of a pre-petition contract is allowable. *See, e.g., In re SNTL Corp.*, 571 F.3d 826, 839-45 (9th Cir. 2009) ("*SNTL*"); *Martin v. Bank of Germantown*, 761 F.2d 1163, 1168 (6th Cir. 1985). Another line of cases holds that such a claim is disallowed. *See, e.g., Adams v. Zimmerman*, 73 F.3d 1164, 1177 (1st Cir. 1996); *Waterman v. Ditto*, 248 B.R. 567, 573 (B.A.P. 8th Cir. 2000).

This Court allowed such claims in a case that was decided under the former Bankruptcy Act, but that commented on section 506(b) of the Code. *In re United Merchants & Mfrs., Inc.*, 674 F.2d 134, 137-39 (2d Cir. 1982). This opinion considers whether United Merchants survives statutory revisions and the Supreme Court's decision in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007). We join the Ninth Circuit's recent decision in SNTL and hold that the Bankruptcy Code does not bar an unsecured claim for post-petition attorneys' fees authorized by a pre-petition contract valid under state law.

Appendix A

III

Two Code provisions bear upon the disputed question: section 502(b) and section 506(b). *Travelers* addresses the first, and *United Merchants* the second.

A

Section 502(b) of the Code provides (with inapplicable exceptions) that a "court, after notice and a hearing, shall determine the *amount* of [a] claim in lawful currency of the United States *as of the date of the filing of the petition*, and shall allow such claim in such amount." 11 U.S.C. § 502(b) (emphases added). A claim, in turn, is a "right to payment, whether or not such right is reduced to judgment, liquidated, *unliquidated*, fixed, *contingent*, matured, *unmatured*, disputed, undisputed, legal, equitable, secured, or *unsecured*." 11 U.S.C. § 101(5)(A) (emphases added). A "right to payment . . . usually refer[s] to a right to payment recognized under state law." *Travelers*, 549 U.S. at 451 (internal quotation marks and citation omitted).

A "contingent" claim under the Code refers "to obligations that will become due upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created." *In re Manville Forest Prods. Corp.*, 209 F.3d 125, 128-29 (2d Cir. 2000) (internal quotation marks omitted). "A claim will be deemed to have arisen pre-petition if the

relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation—a right to payment—under the relevant non-bankruptcy law." *Id.* at 129 (internal quotation marks omitted); *see also SNTL* 571 F.3d at 843-44. "Under contract law, a right to payment based on a written indemnification contract arises at the time the indemnification agreement is executed." *Manville*, 209 F.3d at 129.

Manville therefore makes clear that Fidelity possessed a contingent right to post-petition attorneys' fees, and that its right arose pre-petition. However, the dollar amount of Fidelity's contingent right was not a sum certain on the day the bankruptcy petition was filed. We read *Travelers* to mean that this does not matter.

The Supreme Court framed the *Travelers* issue as follows: "We are asked to consider whether federal bankruptcy law precludes an unsecured creditor from recovering attorney's fees authorized by a prepetition contract and incurred in postpetition litigation." 549 U.S. at 445. True, the facts in *Travelers* were such that the post-petition costs related solely to litigating issues of bankruptcy law (which Ogle contends is a decisive limiting principle); but the Court's analysis and rationale would seem equally applicable to post-petition costs arising out of pre-petition contracts more generally. Furthermore, the way the issue is framed at the outset, *see id.* (as quoted above), defines the scope of the opinion broadly.

This is important because, under Travelers, section 502(b) interposes no bar to an unsecured creditor's ability to recover post-petition attorneys' fees. Travelers starts from the premise that "an otherwise enforceable contract allocating attorney's fees (*i.e.*, one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Id.* at 448. The Court went on to explain that, because—as in the present case—none of the section 502(b) exceptions (enumerated (2)-(9)) applied, Travelers's claim for post-petition fees "must be allowed under § 502(b) unless it is unenforceable within the meaning of § 502(b)(1)." *Id.* at 449-50.

Section 502(b)(1) in turn bars any claim that "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). *Travelers* construed this wording to mean that "any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy." 549 U.S. at 450. Unless a claim is unenforceable under state law or one of the section 502(b)(2)-(9) exceptions applies, courts must "presume" that the claim "will be allowed in bankruptcy unless [it is] expressly disallowed." *Id.* at 452.

All of the fees at issue in *Travelers* were incurred post-petition; so the amount was necessarily unknown when the bankruptcy petition was filed. It follows that if an unsecured claim for post-petition fees was for that

reason unrecoverable, the *Travelers* Court could have disposed of the claim on that simple, available ground alone. *Travelers*, therefore, proceeds along lines that, reasonably extended, would suggest (notwithstanding the Court's express disclaimer) that section 502(b)'s requirement—that the court "shall determine the amount of such claim . . . as of the date of the filing of the petition"—does not bar recovery of post-petition attorneys' fees.

In the present appeal, as in *Travelers*: The underlying contract is valid as a matter of state substantive law; none of the section 502(b)(2)-(9) exceptions apply; and the Code is silent as to the particular question presented—in *Travelers*, whether the Code allows "unsecured claims for contractual attorney's fees incurred while litigating issues of bankruptcy law," 549 U.S. at 453; and here, whether the Code allows unsecured claims for "fees incurred while litigating issues of" contract law more generally.

Accordingly, we hold that an unsecured claim for post-petition fees, authorized by a valid pre-petition contract, is allowable under section 502(b) and is deemed to have arisen pre-petition. *Accord SNTL*, 571 F.3d at 844 ("[W]e reject the position . . . that section 502(b) precludes such fees.").

B

"[C]laims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed." *Travelers*, 549 U.S. at 452. A fair question is raised by Ogle as to whether section 506(b) of the Code amounts to an express disallowance of Fidelity's claim by negative inference or otherwise. Section 506(b) provides in relevant part that "interest on [a] claim, *and any reasonable fees*, costs, or charges provided for under the agreement or State statute under which such claim arose" can be recovered if the creditor is *oversecured*. 11 U.S.C. § 506(b) (emphasis added). So what does section 506(b) say or imply about a similar claim that is *unsecured?*

In *United Merchants*, we observed: "Neither [section 506(b)] nor its legislative history sheds any light on the status of an unsecured creditor's contractual claims for attorney's fees." 674 F.2d at 138. *United Merchants* is therefore dispositive if it survives *Travelers*. We conclude that it does.

As *Travelers* makes clear, the question is whether the Code *disallows* post-petition attorneys' fees, and does so expressly. It was therefore decisive in *Travelers* that "the Code says *nothing* about unsecured claims for contractual attorney's fees incurred while litigating issues of bankruptcy law." 549 U.S. at 453 (emphasis in original). And while *Travelers* declined to address section 506(b) (because the parties had not raised the issue below), *see id.* at 454-56, it is decisive here that

the Code says nothing about such fees incurred litigating things *other* than issues of bankruptcy law. The teaching of *Travelers* is therefore fully consonant with our decision in *United Merchants*.

Accordingly, we hold that section 506(b) does not implicate unsecured claims for post-petition attorneys' fees, and it therefore interposes no bar to recovery.

IV

Ogle adduces three additional reasons for construing the Code to disallow unsecured claims for post-petition attorneys' fees.

[1] Ogle relies on wording in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988), which explained that section 506(b) allows an oversecured creditor to receive post-petition interest only out of the "security cushion," but that an undersecured creditor—who lacks any such cushion—"falls within *the general rule disallowing postpetition interest*." *Id.* at 372-73 (emphasis added). From the italicized phrase Ogle would deduce a general rule favoring his position. However, the wording references section 502(b)(2) of the Code, which expressly disallows a claim for interest that is unmatured. *See id.; see also* 11 U.S.C. § 502(b)(2). In this way, section 506(b) creates a limited exception—for oversecured creditors—from the general rule in section 502(b)(2) that disallows a claim for unmatured interest. *Timbers*, 484 U.S. at 372-73. But while section 502(b)(2)

bars claims for unmatured interest, it does not similarly bar (or even reference) claims for post-petition attorneys' fees. *See SNTL*, 571 F.3d at 844-45.

[2] Ogle argues that an unsecured claim for post-petition attorneys' fees is barred by section 502(e)(2), which provides that a claim for "reimbursement or contribution . . . that becomes fixed after the commencement of the case . . . shall be allowed . . . the same as if such claim had become fixed before the date of the filing of the petition." 11 U.S.C. § 502(e)(2). Ogle's argument relies on *expressio unius*: Because section 502(e)(2) provides an exception to section 502(b) for reimbursement and contribution, it thereby forecloses an exception for post-petition attorneys' fees. However, Travelers requires us to "presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed." 549 U.S. at 452. We cannot, then, as Ogle wishes, draw from section 502(e)(2) an inference by silence or omission.

[3] Ogle argues from policy that allowing an unsecured creditor to collect post-petition attorneys' fees based on a pre-petition contract would unfairly disadvantage other creditors (such as tort claimants and trade creditors) whose distributions would be reduced *pro tanto*. In *United Merchants*, however, we rejected the idea "that the policy of equitable distribution" defeats "an unsecured creditor's otherwise valid contractual claim for collection costs . . . .":

> When equally sophisticated parties negotiate a loan agreement that provides for recovery of collection costs upon default, courts should presume, absent a clear showing to the contrary, that the creditor gave value, in the form of a contract term favorable to the debtor or otherwise, in exchange for the collection costs provision. Such a creditor should recover more in the division of the debtor's estate because it gave more to the debtor at the time it made the loan. Rather than providing an undeserved bonus for one creditor at the expense of others, allowing a claim under a collection costs provision merely effectuates the bargained-for terms of the loan contract.

674 F.2d at 137. Although *United Merchants* was construing the predecessor to the current Bankruptcy Code, *see id.* at 136 n.1, its analysis is equally applicable to the Code today.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK FILED JANUARY 12, 2009

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

No. 6:08-cv-894
(GLS)

D. CLARK OGLE, Liquidating Trustee of The Agway Liquidating Trust,

Appellant,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Appellee.

Gary L. Sharpe
U.S. District Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

The bankruptcy court granted post-petition attorney fees to unsecured creditor Fidelity & Deposit Company of Maryland ("F&D"). D. Clark Ogle, Liquidating Trustee of the Agway Liquidating Trust

("LT") now appeals the bankruptcy court's ruling. For the reasons stated below, this court affirms.

II. BACKGROUND

The relevant facts in this case are undisputed. The only disputed issue is one of law. Briefly, Agway, Inc. ("Agway") filed for bankruptcy protection under chapter 11 of the Bankruptcy Code. *Appellant's Brief* at p. 3. However, before its petition, Agway had entered into a number of casualty insurance policies with various insurance carriers. *Id.* at p. 4. In connection with those policies, Agway provided surety bonds issued by F&D pursuant to certain indemnity agreements. *Id.* Under these agreements, Agway was to reimburse F&D for all amounts paid under the bonds issued to each insurance carrier as security for payment of deductibles and premiums. *Id.* After Agway filed its bankruptcy petition, F&D filed an amended proof of claim, which included a claim for attorney fees and costs/expenses. *See In re Agway, Inc.*, 2008 Bankr. LEXIS 3597, 2008 WL 2827439, at *2 (Bankr. N.D.N.Y. 2008). LT objected to the claim for attorney fees, arguing, among other things, that Bankruptcy Code § 506(b) allows only oversecured creditors to recover this type of fee. *Id.* The bankruptcy court, however, disagreed with LT and allowed F&D's claim. This appeal followed.

Appendix B

III. DISCUSSION

The district court sits as an appellate court when a bankruptcy order is appealed. 28 U.S.C. § 1334. The district court may affirm, reverse or modify the bankruptcy court's ruling or remand the case for further proceedings. Fed.R.Bankr.P. 8013. This court reviews the bankruptcy court's interpretation of the Bankruptcy Code *de novo* and its findings of fact for clear error. *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988-89 (2d Cir. 1990).

In *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 127 S.Ct. 1199 (2007), the Supreme Court rejected a blanket prohibition on recovery of post-petition attorney fees incurred in litigating issues of bankruptcy law. The Court, however, declined to decide whether attorney fees were recoverable in that case because the issue had not been addressed by the lower court. *Travelers*, 127 S.Ct. at 1208. In remanding, the Court stated: "we express no opinion with regard to whether . . . other principles of bankruptcy law might provide an independent basis for disallowing Travelers' claim for attorney's fees." *Id.*

Since *Travelers*, however, bankruptcy courts have visited the issue of post-petition contractual fee claims and have issued split decisions. Recently, the Bankruptcy Appellate Panel for the Ninth Circuit tackled the issue in *Centre Ins. Co. v. SNTL Corp.*, 380 B.R. 204 (9th Cir.BAP 2007). In *SNTL Corp.*, an insurance company asserted a claim for post-petition

attorney fees based on contract agreements. *SNTL Corp.*, 380 B.R. at 207. The trustee had objected to such claim, arguing the Code precluded the claim. *Id.* at 215-16. [HN3]Noting the term "claim" in the Code is broad and includes "contingent" claims, the court in reversing the bankruptcy court and allowing the claim explained:

> Section 502(b)(1) provides that a claim is not allowable if it is unenforceable under the applicable agreement or law for a reason other than because such claim is contingent or unmatured.... Under section 502(b)(1), those contingent claims cannot be disallowed simply because the contingency occurred postpetition.

Id. at 216.

In the case at hand, the bankruptcy court followed the rationale of *SNTL Corp.* and allowed the claim for attorney fees. LT, however, seeks reversal of the bankruptcy court's decision.

LT contends the bankruptcy court erred in allowing attorney fees because § 506(b)— the section considered the sole exception to the rule that claims are to be determined as of the petition date— is limited to oversecured creditors. LT asserts this section precludes unsecured creditors from recovering post-petition fees. Specifically, LT points out that the section's lack of reference to unsecured creditors necessarily means in all other circumstances post-petition attorney fees

should not be allowed. This court disagrees. This section is only concerned with the determination of secured status and what may be included in a secured claim, and does not suggest a limitation on unsecured claims. *See SNTL Corp.*, 380 B.R. at 220. The Supreme Court in *Travelers* clearly stated: "under the terms of the current Bankruptcy Code, it remains true that an otherwise enforceable contract allocating attorney's fees (i.e., one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Travelers*, 127 S.Ct. at 1203-04 (citation omitted).

LT seeks support in the Supreme Court's decision of *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs, Ltd.*, 484 U.S. 365 (1988). However, in *Timbers*, the Supreme Court stated an undersecured creditor could not recover post-petition interest under 506(b), but the Court did not specifically hold the same treatment should be given to attorney fees under 502(b). *Timbers*, 484 U.S. at 373. Section 502(b) does not contain an express exception for post-petition attorney fees. 11 U.S.C. § 502(b). This section provides that if an objection is made to a claim, the claim shall be allowed unless it falls into one of nine delineated categories, but attorney fees is not in one of those categories. *See SNTL Corp.*, 380 B.R. at 220 (citation omitted); *In re Smith*, 2008 Bankr. LEXIS 183, 2008 WL 185784, at *6 (Bankr.W.D.Mo. 2008). The Supreme Court in *Travelers* clearly stated that courts are to presume that "claims enforceable under applicable state law will be allowed

in bankruptcy unless they are expressly disallowed." *Travelers*, 127 S.Ct. at 1206. (citing 11 U.S.C. § 502(b)).

LT also contends § 502(b)(1) disallows attorney fees because such claim is not fixed at the time of the petition date. However, as the *SNTL Corp.* court pointed out, claims (under the Bankruptcy Code) include contingent and unliquidated claims. *See SNTL Corp.*, 380 B.R. at 221. This court agrees that a pre-petition agreement for attorney fees "gives rise to a contingent, unliquidated attorney-fee claim." *Id.* This court also agrees with *SNTL Corp.'s* conclusion that "[s]o long as the right to collect the fees existed pre-petition, the fact that the fees were actually incurred during the post-petition period is not relevant to the determination of whether the creditor has an allowable pre-petition claim for the fees." *Id.* (citation omitted). Therefore, in the case at hand, the bankruptcy court correctly held that "the fact that the fees were incurred postpetition does not negate the fact that F&D's claim is contingent and deemed to have arisen prepetition based on its agreements with the Debtors."[1] *In re Agway, Inc.*, 2008 Bankr. LEXIS 3597, 2008 WL 2827439, at *6.

LT also contends postpetition attorney fees should be denied to "secure equality among creditors." LT's

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1. Because this court agrees that, in this case, the attorney fees arising out of the pre-petition contract fall within the Bankruptcy Code's definition of a claim, *See SNTL Corp.*, 380 B.R. at 221, the court rejects LT's contention that § 502(e)(2) also operates as a bar to F&D's claim of attorney fees. LT's Brief at 15.

Brief at 18. However, this court "cannot agree that the policy of equitable distribution renders an unsecured creditor's otherwise valid contractual claim for collection costs unenforceable in bankruptcy." *In re United Merchants & Mfrs., Inc.*, 674 F.2d 134, 137 (2d Cir. 1982).

In sum, this court agrees with the bankruptcy court that, if allowed under contract and applicable state law, postpetition attorney fees cannot be disallowed. "Congress, of course, has the power to amend the Bankruptcy Code by adding a provision expressly disallowing claims for attorney's fees incurred by creditors in the litigation of bankruptcy issues." *Travelers*, 127 S.Ct. at 1206.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the judgment of bankruptcy court is affirmed; and it is further

ORDERED that the Clerk enter judgment and provide copies of this Decision and Order to the parties.

IT IS SO ORDERED.

Albany, New York
Dated; January 12, 2009

/s/ Gary L. Sharpe
Gary L. Sharpe
U.S. District Judge

APPENDIX C — MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED JULY 18, 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

CASE NO. 02-65872 through 02-65877

Chapter 11
Jointly Administered

IN RE:

AGWAY, INC.

Debtor

IN RE:

AGWAY GENERAL AGENCY, INC.

Debtor

IN RE:

BRUBAKER AGRONOMIC
CONSULTING SERVICE LLC

Debtor

Appendix C

IN RE:

COUNTRY BEST ADAMS, LLC

Debtor

IN RE:

COUNTRY BEST-DEBERRY LLC

Debtor

IN RE:

FEED COMMODITIES
INTERNATIONAL LLC

Debtor

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed by D. Clark Ogle, Liquidating Trustee ("LT") of the jointly administered debtors identified above ("Debtors") on August 26, 2004 (LT's Motion"). The LT's Motion seeks to fix Claim No. 4792, filed by Fidelity and Deposit Company of Maryland ("F&D"), in the amount of $8,194,381.06 and to expunge what the LT argues are duplicate claims. The LT's Motion was originally

scheduled to be heard on September 28, 2004, but has been adjourned many times over a period of three years on consent of the parties (*See* Dkt. Nos. 5583, 5708, 5777, 5825, 5986, 6009, 6122, 6208, 6330, 6389, 6434, 6548, 6639, 6738, 6797, 6842, and 6958.) On September 20, 2007, F&D filed its response to the LT's Motion, as well as a cross-motion to compel distribution to it as an unsecured creditor on the "liquidated" portion of its claims in the amount of $8,194,381.06.

Both the LT's Motion and F&D's Cross-motion were heard at the Court's regular motion term on September 25, 2007, in Utica, New York. On October 16, 2007, the LT filed his response to F&D's Cross-motion. On October 19, 2007, F&D filed a reply to the LT's response and on October 22, 2007, the LT filed a supplemental reply to F&D's reply. Both the LT's Motion and F&D's Cross-motion were adjourned to October 23, 2007. Following oral argument, the Court reserved decision on both motions and allowed the parties an opportunity to file memoranda of law.[1] The matter was submitted for decision on December 3, 2007.

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1. At the hearing on October 23, 2007, there was some discussion of what F&D asserts is an alternative theory of recovery, namely that it holds an exoneration claim. The parties agreed to reserve F&D's right to assert an exoneration claim in the event that it is unsuccessful with its claim for reimbursement. Accordingly, the Court indicated that it would "leave exoneration off the table" for purposes of the briefing schedule.

Appendix C

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), and (b)(2)(B) and (O).

FACTS

On October 1, 2002, the above-captioned Debtors filed voluntary petitions pursuant to chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1532 ("Code"). On April 28, 2004, the Court confirmed the Debtors' Second Amended Joint Plan of Liquidation ("the Plan") and appointed D. Clark Ogle as the Liquidating Trustee.

In the course of its prepetition operations, Agway, Inc. entered into a number of casualty insurance policies with various insurance carriers, including the Travelers Indemnity Company, the National Union Fire Insurance Company, the Reliance Insurance Company and the Pacific Employer's Insurance Company. In connection with those policies, Agway provided surety bonds ("Bonds") issued by "F&D" pursuant to agreements of indemnity whereby Agway, Inc. was to reimburse F&D for all amounts paid by F&D under the Bonds issued to each carrier as security for the payment of deductibles and premiums.[2] According to the LT, the face amount of

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2. According to the LT, F&D asserts that Telmark and the "Agway Energy entities" are also liable under the Agreements

(Cont'd)

the outstanding Bonds issued by F&D is approximately $23.9 million. In addition, allegedly there are letters of credit with a value of approximately $25.7 million. *See* LT's Motion at ¶ 10.

On March 6, 2003, the Court signed an Order establishing May 30, 2003, as the final date for filing proofs of claim against the Debtors. F&D filed a proof of claim on May 29, 2003, in each of the Debtors' cases in the amount of $27,650,330.50. Amended proofs of claim were filed on February 20, 2004, in the amount of $27,650,330.50, of which $2,775,441 was stated as being fixed. Second amended proofs of claim were filed on June 17, 2004, increasing the amount of the fixed portion to $4,369,775.84.[3]

(Cont'd)
of Indemnity. On January 29, 2003, F&D commenced an action against those entities in the U.S. District Court for the District of Maryland, which action was subsequently transferred to the U.S. District Court for the Northern District of New York (Civil Action No. 5:2003-CV-0604) ("Telmark litigation"). On November 18, 2005, Chief U.S. District Judge Norman A. Mordue signed an order indicating that "at this time . . . there is no current reason to maintain this action on the open docket for statistical purposes" but that "any party may reopen the action by advising the Court in writing that the above entitled action should no longer be stayed." F&D asserts that the LT has conceded that "the proceedings in [the bankruptcy case] cannot close until the Telmark litigation has been completed or settled." *See* F&D's Supplemental Brief, filed December 3, 2007 (Dkt. No. 7068) at 11.

3. A second amended proof of claim was not filed in the case of Feed Commodities International, LLC ("FCI").

Appendix C

According to the LT, as of the date of the LT's Motion, F&D has disbursed approximately $3,875,831.01, for which it asserts F&D is entitled to a subrogation claim in that amount pursuant to Code § 509(a). *See* LT's Motion at ¶ 18. On August 25, 2005, Third Amended Proofs of Claim were filed in the amount of $19,652,900. Fourth Amended Proofs of Claim were filed on September 14, 2005, in the amount of $20,730,784.67. Fifth Amended Proofs of Claim were filed on August 31, 2006, in the amount of $22,038,075.66. The Sixth Amended Proofs of Claim, filed on July 11, 2007, lists an increased amount in its fixed and liquidated claim in the amount of $8,194,381.06. The Sixth Amended Proof of Claim filed in Agway, Inc., Case No. 02-65872, also asserts fees and expenses of $635,922.85, interest totaling $1,656,290.57[4] and loss and expense reserves in the amount of $13,917,506. The total amount listed in the Sixth Amended Proof of Claim in Agway, Inc.'s case (Claim No. 4792) is $22,396.220.60.[5]

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4. At the hearing on October 23, 2007, LT's counsel represented to the Court that F&D had agreed that it was not entitled to interest and that that particular component of their proof of claim was "off the table."

5. Since the hearing on October 23, 2007, F&D has filed further amendments in the Debtors' cases. In Agway, Inc.'s case, for example, on November 15, 2007, it filed a Seventh Amended Proof of Claim (Claim No. 4798) in the amount of $19,390,786.33, including $8,614,555.17 in monies actually disbursed to the various insurance carriers, $10,035,605.73 in loss and expense reserves and $740,625.43 in legal fees and costs. Its Eighth Amended Proof of Claim (Claim No. 4804), filed on December

(Cont'd)

Ultimately, the LT requests that the Court expunge all claims filed by F&D, except Claim No. 4792 (the Sixth Amended Proof of Claim) and allow it in the amount of $8,194,381.06, identified by F&D as "costs" and representing the amounts actually disbursed by F&D under the Bonds to the various insurance carriers as of July 11, 2007.

ARGUMENTS

The LT argues that the Court should allow F&D's claim in the amount of $8,194,381.06 as being fixed and liquidated and disallow the balance of its contingent claim. It is the LT's position that Code §§ 502(e)(1) and (e)(2) allow resolution of a claim at a fixed point in time and then distribution may be made on any allowed claim. According to the LT, Code § 502(j) is the proper

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(Cont'd)

18, 2007, is in the amount of $ 19,399,665.12, including $8,623,433.96 in monies actually disbursed to the various insurance carriers, $10,035,605.73 in loss and expense reserves, and $740,625.43 in legal fees and costs. Its Ninth Amended Proof of Claim was filed on May 8, 2008, (Claim No. 4811) also in the amount of $19,399.665.12, including $8,652,847.68 in monies actually disbursed to the various insurance carriers (an increase of $458,466.62 since the Sixth Amended Proof of Claim was filed), $10,035,605.73 in loss and expense reserves and $884,506.28 in legal fees and costs (an increase of $248,583.43 since the Sixth Amended Proof of Claim was filed). There is no dispute that while proofs of claim have been filed in a number of the Debtors' cases, F&D is only entitled to one recovery, whether it be from Agway, Inc. or some other related entity.

procedure to later revisit a claim to the extent that it was previously disallowed.

It is F&D's position that the Court has discretion to allow its fixed and liquidated claim pursuant to Code § 502(e)(2) and simply defer disallowing the balance of its contingent claim. According to F&D, this approach would alleviate the need for it to file a series of motions pursuant to Code § 502(j) seeking reconsideration of the disallowance of its contingent claim once actual disbursements under the Bonds have been made and the claim(s) becomes fixed and liquidated. F&D argues that "it will make sense to rule on the motion when it would be meaningful: either at the end of the case or after the LT obtains releases of the Bonds from the insurance carriers." F&D's Supplemental Brief, dated December 3, 2007 (Dkt. No. 7068), at 6.

Additionally, the LT objects to F&D's claim for attorneys' fees and costs/expenses in the amount of $635,922.85, as set forth in F&D's Sixth Amended Proof of Claim, arguing that Code § 506(b) allows only oversecured creditors to recover reasonable attorneys' fees and costs. F&D relies on the recent United States Supreme Court decision in *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007), as well as *United Merchs. & Mfrs., Inc. v. Equitable Life Assurance Soc'y of the U.S. (In re United Merchs. & Mfrs., Inc.)*, 674 F.2d 134, 137-38 (2d Cir. 1982) *and In re Qmect, Inc.*, 368 B.R. 882 (Bankr. N.D. Calif. 2007), in arguing that it is entitled to recover postpetition attorneys' fees and costs, as authorized

under its contract with Agway, as part of its unsecured claim.[6]

DISCUSSION

The Court's analysis must begin with the basic premise that a claim is broadly defined under the Bankruptcy Code. *See Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 91 (2d Cir. 1997). Pursuant to Code § 101(5), a claim includes a right to payment "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, *contingent*, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A) (emphasis added). Payment of the claim by the bankruptcy estate is dependent on whether or not the claim is allowed. A claim is "deemed allowed" unless a party in interest objects. 11 U.S.C. § 502(a). If there is an objection, as is the case herein, the Court, after notice and a hearing, "shall determine the amount of such claim . . . as of the

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6. The Supreme Court declined to reach the issue of whether Travelers, as an unsecured creditor, could recover postpetition attorneys' fees. It held that "an otherwise enforceable contract allocating attorney's fees . . . is allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Travelers Cas.*, 127 S.Ct. at 1204. The Supreme Court ultimately vacated the judgment of the U.S. Court of Appeals for the Ninth Circuit and remanded the case for further proceedings consistent with its opinion. On May 8, 2008, the U.S. Court of Appeals for the Ninth Circuit remanded the case to the district court with instructions to remand it to the bankruptcy court for further proceedings. *See Travelers Cas.*, 525 F.3d 885 (9th Cir. May 8, 2008).

date of the filing of the petition, and shall allow such claim in such amount . . ." subject to certain exceptions identified in the statute. 11 U.S.C. § 502(b).

Code § 502(e)(1)(B)

Code § 502(e)(1)(B) is one such exception and provides that "the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that . . . such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution . . ." 11 U.S.C. § 502(e)(1)(B).

The LT points out that under the terms of the Plan there is to be no payment or distribution on a disputed claim until it is an "allowed claim." *See* Article 8.01 of the Plan. With its Cross-motion, F&D requests that the Court allow its claim to the extent that it is currently "liquidated," thereby entitling it to a distribution at this time. As noted above, the LT takes no issue with F&D receiving payment of $8,194,3 81.06, as set forth in its Sixth Amended Proof of Claim, as an allowed claim. However, it is the LT's position that the balance of F&D's claim, to the extent that it is currently contingent, should be disallowed.

The Court has reviewed the case law cited by both parties. None of the cases provide the remedy that F&D is proposing, namely, having the Court defer disallowance of the balance of F&D's claim until the end

of the case. Code § 502(e)(1)(B) directs that the Court "shall disallow" any claim for reimbursement or contribution to the extent that such claim is contingent at the time of allowance or disallowance. As pointed out by U.S. District Judge, Loretta A. Preska of the United States District Court for the Southern District of New York, in *Aetna Cas. and Sur. Co. v. Georgia Tubing Co.*, Case No. 93 Civ. 3659, 1995 WL 429018 (S.D.N.Y. July 20, 1995), *aff'd* 93 F.3d 56 (2d Cir. 1996), both U.S. Bankruptcy Judge Francis J. Conrad and U.S. Bankruptcy Judge Burton R. Lifland disallowed the proofs of claim filed by Aetna in related reorganization proceedings and indicated that Aetna's remedy in both cases was to move for reconsideration pursuant to Code § 502(j). *Id.* at *1 and *5 n.3; *see also In re Worldcom, Inc. Sec. Litig.*, *293* B.R. 308, 323 (S.D.N.Y. 2003) (noting that "[w]here a contingent claim is disallowed, it may be reconsidered when the contingency is 'resolved'"); *In re Pinnacle Brands, Inc.*, 259 B.R. 46, 56 (Bankr. D.Del. 2001).

Thus, F&D has a remedy pursuant to Code § 502(j) to have its claim(s) reconsidered once the claim(s) has become fixed and liquidated. The Court is at a loss to understand the advantage to F&D in having the Court defer indefinitely its ruling on the disallowance of F&D's claim(s). It has suggested that this will result in its having to make several motions in the future pursuant to Code § 502(j). However, if it were willing to wait for the Court to delay ruling on the disallowance of its claim(s) to some date in the future, then it should have no problem delaying any requests for reconsideration

of the disallowance of its claim(s) pursuant to Code § 502(j) as well. It appears to be a distinction without a difference as far as the treatment of its claim(s) is concerned.

However, in light of the fact that it has now been several months since the LT's Motion was heard and F&D has filed three additional amended proofs of claim within that time frame, the Court will consider any objections the LT has to F&D's Ninth Amended Proof of Claim, consistent with this Decision, before allowing F&D's claim for the amounts actually disbursed by it under the Bonds through May 8, 2008.

Allowance of F&D's Claim for Attorneys' Fees

At the hearing on October 23, 2007, the LT made an argument that the addition of a claim for attorneys' fees and costs incurred in "attempting to enforce the Indemnity Agreement" by F&D, beginning with its First Amended Proof of Claim (Claim No. 4568), filed on February 20, 2004, in the amount of $391,018, represents a new claim and not an "amendment." However, as one court has noted, "as a general rule, amendments intended merely to increase the amount of a claim grounded in the same right to payment are not considered 'new' claims under the Code." *See In re Hemingway Transport, Inc.*, 954 F.2d 1, 10 (1st Cir. 1992). In this case, F&D's claim or right to payment includes not only the monies it has disbursed under the Bonds, but also any attorneys' fees and costs, under the terms of the indemnity agreements entered into with the

Debtors. Thus, the Court does not construe the addition of attorneys' fees and costs to be a "new" claim but rather an amended claim.

The Supreme Court in *Travelers Casualty* limited its discussion to "whether the Bankruptcy Code disallows contract-based claims for attorneys' fees, based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law." *Travelers Cas.*, 127 S.Ct. at 1204. It pointed out that "it remains true that an otherwise enforceable contract allocating attorney's fees (i.e., one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Id.* In the matter under consideration, this Court is asked to address whether the Bankruptcy Code "provides otherwise" such that F&D's claim for attorneys' fees, incurred postpetition, should be disallowed because of its status as an unsecured creditor.

This issue was recently addressed by the court in *In re SNTL Corp.*, 380 B.R. 204 (9th Cir. BAP 2007) in which the Bankruptcy Appellate Panel for the Ninth Circuit discussed the split in decisions both pre- and post-*Travelers*. For example, the United States Court of Appeals for the Second Circuit in *United Merchants*, 674 F.2d at 139, in what *SNTL Corp.* refers to as one of the minority line of cases, allowed unsecured creditors to claim "collection costs," including reasonable attorney's fees, incurred postpetition based on a

prepetition contract.[7] As pointed out by *SNTL Corp.*, the split has continued post-*Travelers*. *Compare Qmect, Inc.*, 368 B.R. 882 (allowing contract-based attorney's fees incurred postpetition in its prepetition claim) to *In re Electric Mach. Enters., Inc.*, 371 B.R. 549 (Bankr. M.D. Fla. 2007) (disallowing unsecured creditor's postpetition attorneys' fees). Ultimately, the court in *SNTL Corp.* agreed with the reasoning of the court in *Qmect* and concluded that "claims for postpetition attorneys' fees cannot be disallowed simply because the claim of the creditor is unsecured." *SNTL Corp.*, 380 B.R. at 223.[8]

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7. This Court, of course, is bound by the decisions of the U.S. Court of Appeals for the Second Circuit unless there is a basis for distinguishing those cases. Admittedly, *United Merchants* was decided under the Bankruptcy Act without consideration of Code § 506(b). In view of the Court's conclusions herein, it need not decide whether this distinction has merit for purposes of the issue before this Court.

8. The debate has found itself presented not only in the case law but also in several law review articles: Mark S. Scarberry, *Interpreting Bankruptcy Code Sections 502 and 506: Post-Petition Attorney's Fees in a Post-Travelers World*, 15 AM. BANKR. INST. L. Rev. 611 (Winter 2007); Jennifer M. Taylor and Christopher J. Mertens, *Travelers and the Implications on the Allowability of Unsecured Creditors' Claims for Post-petition Attorneys' Fees against the Bankruptcy Estate*, 81 AM. BANKR. L.J. 123 (Spring 2007); N. Theodore Zink, Jr. and Andrew Rosenblatt, *An Unsecured Creditor's Right to Recover Attorneys' Fees: Highlighting the Section 502/Section 506 Dispute*, J. OF BANKR. L. 2007.06-2 (June 2007); *see also* Ray

(Cont'd)

Appendix C

The LT's makes several arguments in his objection to F&D's claim for attorneys' fees. The first, of course, is based on the language in Code § 506(b) and the maxim of statutory construction known as *expressio unius est exclusio alterius*.[9] It is the LT's position that because Congress expressly allowed attorneys' fees, as well as interest, only for holders of oversecured claims, to the extent of the value of the property securing the claims pursuant to Code § 506(b), it necessarily follows that attorneys' fees for holders of unsecured claims should not be allowed since there is no comparable provision authorizing unsecured creditors to collect their attorneys' fees from a debtor's estate. Yet, Code § 506(b) is not concerned with the question of claim *allowance*. It is concerned with the "[d]etermination of secured status" and what may be included in a secured claim. *See SNTL Corp.*, 380 B.R. at 220.

It is Code § 502(b), not Code § 506(b), that governs the allowance and disallowance of claims. *Id.*, citing *In re Rodriguez*, 375 B.R. 535, 545 (9th Cir. BAP 2007). The LT, as well as many courts in the "majority," make the argument that disallowance of claims by unsecured

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(Cont'd)

Geoffroy, *Show Me the Money; The Debate over Creditors' Postpetition Attorneys' Fees*, 14 BANKR. DEV. J. 425 (1998) and Liore Z. Alroy and J. Michael Mayerfeld, *Contracted for Post-Petition Attorneys' Fees and Collection Costs: United Merchants Revisited*, 1992 COLUM. BUS. L. REV. 309 (1992).

9. Translated "the expression of one thing is the exclusion of another."

creditors such as F&D for attorneys' fees incurred postpetition is mandated based on the Supreme Court's twenty year old decision in *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988). In that case, the Supreme Court held that an undersecured creditor could not receive postpetition interest on the unsecured portion of its debt. *Id.* at 380. The court's holding comports with Code § 502(b)(2), which expressly excepts from allowance a claim for unmatured interest. This exception is, of course, subject to the specific statutory provision of Code § 506(b), which includes a claim for unmatured interest if provided by contract or agreement as long as the creditor is oversecured, and then only to the extent of the value of the security.[10] Code § 502(b) does not contain a similar prohibition against the allowance of attorneys' fees. *See SNTL Corp.*, 380 B.R. at 220, citing *Qmect, Inc.*, 368 B.R. at 885; *In re New Power Co.*, 313 B.R. 496, 509-10 (Bankr. N.D.Ga. 2004); *but see In re Woodmere Investors Ltd. P'ship*, 178 B.R. 346, 355-56 (Bankr. S.D.N.Y. 1995) (distinguishing *United Merchants* and concluding that the rationale of *Timbers* was applicable to the disallowance of a claim for attorney's fees and costs).

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10. Code § 506(b) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to provide for "reasonable fees, costs, or charges provided for under the agreement *or State statute* under which such claim arose." The new language has no application to the matter herein. In addition, the new language has application only to cases filed after October 17, 2005.

In fact, the Supreme Court in *Travelers Casualty*, without considering the effect of Code § 506(b), indicated that "'claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed' under Code § 502(b)." *In re Smith*, Case No. 06-60768, 2008 WL 185784, at *6 (Bankr. W.D.Mo. Jan. 19, 2008), quoting *Travelers Cas.*, 127 S.Ct. at 1206. Accordingly, the Court concludes that the analysis in *Timbers* and its discussion of Code § 506(b) with respect to an allowance of postpetition interest is not persuasive on the issue of attorneys' fees and costs under the circumstances now before this Court as more fully discussed below.

A third argument that needs to be considered is when F&D's claim for attorneys' fees arose. Code § 502(b) requires that the Court "determine the amount of such claim . . . as of the date of the filing of the petition." 11 U.S.C. § 502(b). Yet, as of the petition date the fees for which F&D now seeks to recover were contingent to the extent that the indemnity agreements provided for them. Nevertheless, under its contract with the Debtors, it had a right to payment or a "claim" as of the prepetition date, despite the fact that it may have been unliquidated, unmatured and contingent. As pointed out by the court in *SNTL Corp.*,

> "if the creditor incurs the attorneys' fees postpetition in connection with exercising or protecting a prepetition claim that included a right to recover attorneys' fees, the fees will be prepetition in nature, constituting a

> contingent prepetition obligation that became fixed postpetition when the fees were incurred."

See SNTL Corp., 380 B.R. at 221, quoting 5 *Collier on Bankruptcy* § 4553.03[1][i] (15th ed. updated 2007); *see also New Power*, 313 B.R. at 508 (indicating that "[s]o long as the right to collect the fees existed prepetition, the fact that the fees were actually incurred during the post-petition period is not relevant to the determination of whether the creditor has an allowable pre-petition claim for the fees"); *see also Qmect, Inc.*, 368 B.R. at 884 (indicating that the fact that the claim was contingent as of the petition date is not a basis for disallowance of the claim); *Insurance Co. of North America v. Sullivan*, 333 B.R. 55, 62 (D.Md. 2005) (embracing proposition that "a prepetition indemnity agreement covering attorney's fees creates a contingent right to those attorney's fees for litigation occurring postpetition [in fulfilling surety obligations]").

The Court believes that the contingent nature of F&D's claim, including its claim for attorneys' fees and costs, distinguishes it from other cases in analyzing whether such a claim should be allowed despite F&D's status as an unsecured creditor. As discussed above, the fact that the fees were incurred postpetition does not negate the fact that F&D's claim is contingent and deemed to have arisen prepetition based on its agreements with the Debtors. In the view of the Court, the only issue is the whether the fees and costs are enforceable under applicable state law and whether they are reasonable.

The LT also makes the argument that disallowance of F&D's claim for attorneys' fees promotes equality of distribution among other unsecured creditors whose claims are based on contracts that have no provision for an award of attorneys' fees or claims such as those are based on torts and not contracts. However, the U.S. Court of Appeals for the Second Circuit in *United Merchants* took exception to this position, stating that the court "cannot agree that the policy of equitable distribution renders an unsecured creditor's otherwise valid contractual claim for collection costs unenforceable in bankruptcy." *United Merchants*, 674 F.2d at 137.

Courts have also expressed concerns that if unsecured creditors were permitted to recover their attorneys' fees pursuant to their prepetition contract, there would be nothing to prevent "individual creditors from utilizing scorched-earth litigation tactics or absorbing an inequitable amount of estate assets." *Elec. Mach.*, 371 B.R. at 551-53. Such policy concerns are more appropriately addressed by Congress, rather than the courts. *See SNTL Corp.*, 380 B.R. at 222. As pointed out by the Court in *SNTL Corp.*, some of these concerns have been addressed by Congress by requiring that compensation for attorneys that is to be paid from the estate be reasonable. *See id.*, n.20 (listing Code §§ 303(i)(1)(B), 329(b), 330(a), 502(b)(4), and 503(b)(4) which refer to "reasonable compensation" and the "reasonable value of services").

The Court concludes that the Bankruptcy Code does not prohibit the allowance of F&D's claim for attorneys'

fees and costs, to the extent that it is a prepetition contingent claim which was fixed postpetition and provided that the fees and costs are reasonable and enforceable under substantive nonbankruptcy law. Accordingly, the Court deems it appropriate to allow the LT an opportunity to review said fees and costs in F&D's Ninth Amended Proofs of Claim and to file any objections it may have before the Court rules on the allowance of said fees and costs, as well as F&D's fixed and liquidated claim for reimbursement.

Based on the foregoing, it is hereby

ORDERED that the LT's Motion is granted insofar as the Court will allow the claim of F&D to the extent that it is fixed and liquidated and represents the amounts actually disbursed under the Bonds to the various insurance carriers, as of May 8, 2008, when the Ninth Amended Proof of Claim was filed, subject to the LT's objection as set forth below; it is further

ORDERED that the LT shall have thirty (30) days from the date of this Order to file a motion objecting to the fixed and liquidated portion of the Ninth Amended Proof of Claim in the amount of $8,652,847.68; it is further

ORDERED that in the event that the LT files no objection to the fixed and liquidated portion of the Ninth Amended Proof of Claim in the amount of $8,652,847.68 within said 30 days, that the LT make a distribution on said "liquidated" portion of F&D's claim in accordance

with Debtors' Second Amended Joint Plan of Liquidation confirmed by the Court, dated April 28, 2004; it is further

ORDERED that the LT shall have thirty (30) days from the date of this Order to file a motion on notice and hearing, objecting to F&D's claim for attorneys' fees and costs, as set forth in its Ninth Amended Proof of Claim in the amount of $884,506.28, solely on the basis of their reasonableness and the extent to which they were contingent on October 1, 2002 and enforceable under the terms of the indemnity agreements, for the Court's consideration before allowing said claim; it is finally

ORDERED that the balance of F&D's prepetition claim, as reflected in its Ninth Amended Proof of Claim, to the extent it remains contingent, is disallowed, subject to being reconsidered pursuant to Code § 502(j), on motion filed by F&D not earlier than six (6) months from the date of this Order, and thereafter at intervals of not less than six (6) months, unless otherwise ordered by this Court for good cause.

Dated at Utica, New York
this 18th day of July 2008

/s/ Hon. Stephen D. Gerling
STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

APPENDIX D — RELEVANT STATUTES

11 U.S.C. § 101. Definitions

In this title the following definitions shall apply:

* * *

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

* * * *

11 U.S.C. § 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made,

the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

* * *

(e) (1) Notwithstanding subsections (a), (b) and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

* * *

(g) (1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

* * * *

11 U.S.C. § 506. Determination of secured status

(a) (1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

* * *

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

* * * *

Supreme Court, U.S.
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No. 09-938

IN THE
Supreme Court of the United States

D. CLARK OGLE, LIQUIDATING TRUSTEE
OF THE AGWAY LIQUIDATING TRUST,
Petitioner,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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MARCH 26, 2010

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether, in light of *Travelers Casualty & Surety Co. v. PG&E*, 549 U.S. 443 (2007), a general unsecured claim for post-petition attorneys' fees must be allowed in bankruptcy when authorized by a valid prepetition contract and not expressly excluded under 11 U.S.C. § 502 (2006).

RULE 29.6 STATEMENT

Respondent Fidelity & Deposit of Maryland ("F&D") is wholly owned by Zurich American Insurance Company ("ZAIC"), a property and casualty insurance company domiciled in New York. ZAIC is a wholly owned subsidiary of Zurich Holding Company of America, a Delaware Holding Company. Its ultimate parent is Zurich Financial Services, Ltd. ("ZFS"). ZFS is a publicly traded Swiss holding company. There is no publicly held company that owns 10% or more of ZFS's stock.

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6 Alan N. Resnick & Henry J. Sommer, *Collier Bankruptcy Practice Guide* ¶ 92.07[2], at 92-15–92-17 (2009) 12

Fidelity & Deposit Company of Maryland ("F&D") respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

This case presents a question of bankruptcy law—whether an unsecured creditor's claim for post-petition attorneys' fees is allowable—that the courts of appeals have consistently and adequately addressed based on the comprehensive framework this Court provided in *Travelers Casualty & Surety Co. v. PG&E*, 549 U.S. 443 (2007) ("*Travelers*").

I. F&D'S ENFORCEABLE CLAIM FOR ATTORNEYS' FEES

This case arises from a prepetition agreement between Agway, Inc. ("Agway") and F&D. Pursuant to the agreement, F&D provided surety bonds on behalf of Agway to its insurers. In return, Agway agreed to indemnify F&D for payments it made under the bonds as well as expenses F&D incurred enforcing its rights under the agreement, including attorneys' fees.

Agway declared bankruptcy under Chapter 11. As a result, F&D paid millions of dollars under its bonds and continues to incur substantial attorneys' fees enforcing its indemnity rights against Agway. Petitioner, trustee of the Agway Liquidating Trust, concedes both the validity and enforceability of the prepetition agreement and the reasonableness of the attorneys' fees. Nonetheless, Petitioner refuses to allow F&D an unsecured claim in the bankruptcy for its expenses based on the contention that the Bankruptcy Code does not permit an unsecured

creditor, such as F&D, to recover attorneys' fees incurred post-petition.

The bankruptcy court rejected Petitioner's arguments. It pointed out that 11 U.S.C. § 502 requires courts to determine the amount of claims and to allow them unless they are precluded by a specific exception in § 502(b). The bankruptcy court found no such exception and deemed § 506 irrelevant because it deals with secured claims. Therefore, the bankruptcy court allowed F&D's claim for attorneys' fees. Pet. App. at 30a–37a. The district court reached the same conclusion, also relying on this Court's guidance in *Travelers*. *Id.* at 17a–21a.

II. The Second Circuit's Decision

The Second Circuit affirmed. The court applied the framework set forth in *Travelers* and concluded the initially contingent nature of F&D's claim did not foreclose recovery.

First, the Second Circuit determined that, "under *Travelers*, section 502(b) interposes no bar to an unsecured creditor's ability to recover post-petition fees." Pet. App. at 9a. It applied this Court's principle that, "[u]nless a claim is unenforceable under state law or one of the section 502(b)(2)–(9) exceptions applies, courts must 'presume' that the claim 'will be allowed in bankruptcy unless [it is] expressly disallowed'" elsewhere in the Code. Pet. App. at 9a (quoting *Travelers*, 549 U.S. at 452). The court concluded that the § 502(b) requirement that the amount of a claim be determined "as of the date of the filing of the petition" did not bar recovery because *Travelers* dealt with a claim for post-petition

attorneys' fees and did not identify that provision as a bar. *Id.* at 10a.

Next, the court addressed Petitioner's argument that 11 U.S.C. § 506(b) (2006) implicitly prevents an unsecured creditor from recovering fees because it specifically permits an oversecured creditor to recover "reasonable fees" as part of a secured claim. Pet. App. at 11a. The court relied on *Travelers*' command that fees may only be disallowed based on an express prohibition in the Code. *Id.* at 11a–12a. Section 506(b) does not expressly disallow unsecured claims for post-petition attorneys' fees, and therefore does not preclude recovery. *Id.*

The Second Circuit then distinguished *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988) ("*Timbers*"). *Timbers*, the court explained, addressed interest, not fees. Section 502(b)(2) contains an express rule disallowing unmatured interest, and § 506(b) provides an exception that permits oversecured creditors to recover post-petition interest to the extent of their security. The Code contains no similar rule prohibiting claims for post-petition attorneys' fees.

The court later rejected Petitioner's argument predicated on § 502(e)(2), which provides that contingent claims for reimbursement or contribution should be allowed or disallowed "the same as if such claim had become fixed" prepetition. 11 U.S.C. § 502(e)(2). The court concluded Petitioner cannot invoke *expressio unius* in the face of *Travelers*' admonition that enforceable claims are presumed allowed in bankruptcy "unless they are *expressly* disallowed" under the Code. Pet. App.

at 13a (quoting *Travelers*, 549 U.S. at 452) (emphasis added).

Finally, the court dispatched of Petitioner's policy arguments. It emphasized the importance of honoring "bargained-for terms" in a valid contract over concerns for equitable distribution. Finding no legal bar to recovery, the court allowed F&D's claim.

REASONS FOR DENYING THE PETITION

The petition does not identify an issue warranting review. Since this Court's decision in *Travelers*, only two courts of appeals have considered the status of claims for post-petition attorneys' fees, and both reached the same conclusion—the Bankruptcy Code permits these fees. Moreover, both decisions rest securely on the framework laid out by this Court in *Travelers*.

This Court required claims for attorneys' fees to be allowed unless expressly disallowed under the Bankruptcy Code. The Code does not expressly prohibit unsecured prepetition claims for post-petition attorneys' fees. Contrary arguments based on implied disallowances are inconsistent with the logic of *Travelers*.

I. THE DECISION BELOW DOES NOT CONFLICT WITH RELEVANT OPINIONS FROM ANY OTHER CIRCUIT OR THIS COURT.

Petitioner seeks *certiorari* to address a defunct conflict that this Court effectively resolved in *Travelers*.

A. This Court's Decision in *Travelers* Substantially Clarified The Law on Claims for Attorneys' Fees.

In *Travelers*, this Court overturned a Ninth Circuit rule that treated certain post-petition attorneys' fees in bankruptcy differently from other unsecured claims. This Court insisted that attorneys' fees are governed by the existing framework of § 502. The Court reserved consideration of the interrelationship between §§ 502 and 506(b), as that issue had not been properly raised before the lower courts. *See* 549 U.S. at 456. However, the Court instructed that attorneys' fees must be allowed unless expressly disallowed by the Code. *Id.* at 452. The framework established in *Travelers* guides any inquiry concerning attorneys' fees and directs the result.

First, under *Travelers*, a claim for attorneys' fees is treated the same as any other kind of claim. While the American Rule typically requires parties in litigation to pay their own attorneys' fees, this rule can be overcome by operation of a statute or a contract. *Travelers*, 549 U.S. at 448–49. Like any other contract, a contract allocating attorneys' fees, if enforceable under nonbankruptcy law, is "allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Id.* at 448. The question, then, is whether the Bankruptcy Code disallows unsecured claims arising from prepetition contracts for post-petition attorneys' fees.

Section 502 governs whether a claim is allowed or disallowed. 549 U.S. at 449 (citing 11 U.S.C. § 502). If a party objects to a claim, § 502 provides, "the court 'shall allow' the claim 'except to the extent that'

the claim implicates any of the nine exceptions enumerated in § 502(b)." *Id.* (citing 11 U.S.C. § 502(b)). Eight of the nine exceptions, § 502(b)(2)–(9), have no relation to a creditor's claim for attorneys' fees. *Id.* Thus, a creditor's claim for attorneys' fees "must be allowed under § 502(b) unless it is unenforceable within the meaning of § 502(b)(1)." *Id.* at 450. A claim is unenforceable within the meaning of § 502(b)(1) only if a substantive defense, available outside of bankruptcy, applies. *Id.* As Petitioner concedes, no such defense applies here.

If, on the other hand, a claim is enforceable under nonbankruptcy law, it "will be allowed in bankruptcy unless [it is] *expressly disallowed*" by a provision of the Bankruptcy Code. *Id.* at 452 (emphasis added). Failure to identify textual support in the Code is "fatal" to a purported disallowance. *See id.* Therefore, the final question under the *Travelers* framework is whether another provision in the Code "'clearly and expressly'" compels disallowance. *See id.* (quoting *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302 (2003)).

With respect to the present case, this last query is the only question left unanswered by *Travelers*. The Code has no provision, however, that "clearly and expressly" disallows unsecured claims arising from prepetition contracts for post-petition attorneys' fees. Thus, *Travelers*' has led to a consensus that the Code allows these types of claims.

B. Post-*Travelers* Decisions Do Not Demonstrate a Live Conflict.

Petitioner cannot cite to a live conflict between the courts of appeals. Only two circuits have considered this issue and both applied the *Travelers* framework to hold that the Bankruptcy Code does not bar unsecured claims for post-petition attorneys' fees authorized by a valid prepetition contract.

Other than the Second Circuit, the only other court of appeals that has considered unsecured claims for attorneys' fees after *Travelers* is the Ninth Circuit in *In re SNTL Corp.*, 571 F.3d 826 (9th Cir. 2009) (adopting the opinion of the Bankruptcy Appellate Panel, at 380 B.R. 204 (B.A.P. 9th Cir. 2007)). In that case, just as the present case, the court followed the *Travelers* framework and concluded the Code does not specifically disallow such fees.

A myriad of lower courts have issued decisions since *Travelers*, a clear majority of which follow the *Travelers* framework and allow unsecured claims for post-petition fees. *See, e.g., In re Busch*, 369 B.R. 614, 625 (B.A.P. 10th Cir. 2007) (applying *Travelers* to a claim for attorney's fees allocated by state statute); *In re Marks*, 394 B.R. 198, 206 (Bankr. N.D. Ill. 2008) (concluding that unless § 506(b) applies, parties may only recover attorney's fees based on their contract); *In re Qmect, Inc.*, 368 B.R. 882, 886 (Bankr. N.D. Cal. 2007) (unsecured creditor was entitled to include in its claim contract-based attorneys' fees incurred post-petition). In decisions where lower courts have disallowed unsecured claims for attorneys' fees, the opinions either fail to cite *Travelers* or simply ignore the guidance it

provides. *See, e.g., In re Elec. Mach. Enters.*, 371 B.R. 549, 552 (Bankr. M.D. Fla. 2007) (acknowledging, but failing to discuss, the *Travelers* decision).[1]

Travelers has had a decisive impact on the law. There is no current conflict among post-*Travelers* appellate decisions and *Travelers* continues to shape lower courts' perceptions. Accordingly, there is no need for this Court to take up this issue at this time.

C. Pre-*Travelers* decisions do not provide sufficient justification to merit this Court's review.

Unable to demonstrate a live conflict, Petitioner tries to capitalize on an ostensible Circuit conflict that preceded *Travelers*. Petitioner cites two facially adverse appellate decisions rendered before *Travelers*, but only one Circuit opinion. Pet. at 6. These decisions do not establish any Circuit conflict.

Petitioner first cites *Adams v. Zimmerman*, 73 F.3d 1164 (1st Cir. 1996). As Petitioner acknowledges, *see* Pet. at 6 n.1, *Adams* involved banking law—not the Bankruptcy Code—and, in the context of drawing an analogy, simply remarked on recovery of attorneys' fees in bankruptcy. *Adams*, 73 F.3d at 1177. This hardly demonstrates a split of authority.

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[1] Petitioner cites several law review articles predicting treatment of attorneys' fees in the post-*Travelers* world. Pet. at 10. All of these articles preceded the two post-*Travelers* decisions in the courts of appeals.

Further, *Adams* is significantly undercut by a post-*Travelers* decision of the First Circuit. *In re Gencarelli*, 501 F.3d 1 (1st Cir. 2007). There the court addressed whether the reasonableness requirement of § 506(b) limited a creditor's right to recover on a contractual prepayment penalty from a solvent debtor. *Id.* According to the court, the case "turn[ed] on the interrelationship between sections 502 and 506(b) of the Code." 501 F.3d at 4. It agreed with the creditor that "whereas section 506 furnishes a series of useful rules for determining whether and to what extent a claim is secured (and, therefore, entitled to priority), it does not answer the materially different question of whether the claim itself should be allowed or disallowed." *Id.* at 5. Although, in *Gencarelli*, the First Circuit found "no principled basis for treating attorneys' fees differently from prepayment penalties in this context," *id.* at 6 n.1, it left open the question of attorneys' fees for a future case. Nonetheless, its rationale contradicted the dictum in *Adams* and, at a minimum, proved the issue remains open in that circuit.

The other pre-*Travelers* appellate opinion cited by Petitioner is *In re Waterman*, 248 B.R. 567 (B.A.P. 8th Cir. 2000). *Waterman* is not a Circuit decision at all, but the views of a bankruptcy appellate panel, equivalent to a district court hearing bankruptcy appeals.[2] The *Waterman* panel unremarkably

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[2] A bankruptcy court decision may be appealed either to a district court or a bankruptcy appellate panel. Fed. R. Bankr. P. 8001–20. A party appeals an adverse bankruptcy appellate panel decision to a court of appeals. Fed. R. App. P. 6.

allowed an oversecured creditor to recover post-petition attorneys' fees under § 506(b), but offered the comment that "generally, a creditor's claim is determined as of the date of the filing of the bankruptcy petition and . . . amounts incurred post-petition are not usually permitted as part of the claim[.]" *Id.* (citing *In re Henry*, 183 B.R. 748, 750–51 (Bankr. N.D. Tex. 1995)). This comment is dictum and the case relied on for this proposition does not address attorneys' fees and does not analyze or even cite to §§ 502 or 506. *See In re Henry*, 183 B.R. at 748–51. The Eighth Circuit itself has not addressed the issue, either before or after *Travelers*.

With the overruling of the Ninth Circuit rule in *Travelers*, the undermining of the First Circuit comment by *Gencarelli*, and the absence of an on-point holding by the Eighth Circuit, any conflict has dissipated. In addition, the Second and Ninth Circuits are consistent with other circuits that, even prior to *Travelers*, indicated their willingness to allow post-petition attorneys' fees. *See In re Dow Corning Corp.*, 456 F.3d 668, 680–86 (6th Cir. 2006); *In re Welzel*, 275 F.3d 1308, 1318–20 (11th Cir. 2001).

With no actual inter-circuit conflict, the Petitioner urges that the Second Circuit's decision conflicts with this Court's opinion in *Randolph v. Scruggs*, 190 U.S. 533 (1903). This 100 year-old case does not address the key provisions of the Bankruptcy Code on which the present case turns; indeed, it was decided 75 years before the Code was enacted. In addition, *Randolph* addresses an administrative expense obligation arising from a voided assignment, whereas F&D asserts a general

unsecured claim. Petitioner cannot create a conflict by reaching back more than 100 years to an entirely different statute.

II. THE DECISIONS BELOW ARE CORRECT.

Review by this Court is also unnecessary because each of the courts below reached the right conclusion based on the framework provided in *Travelers*. As recognized in *In re SNTL Corp.*, 571 F.3d at 840–41, opponents of unsecured claims for attorneys' fees incurred post-petition commonly assert four arguments. Each of these arguments has been considered and properly rejected by both the Ninth and Second Circuits.

A. Section 506(b) does not preclude unsecured claims for attorneys' fees.

Petitioner asserts that the Second Circuit's decision renders § 506(b) superfluous. This is merely a renovation of their earlier argument that, because § 506(b) expressly permits an oversecured creditor to recover "reasonable fees," the Code's silence with respect to unsecured creditors means that they may not recover any fees. This argument fails under the structure of the Code as interpreted in light of the *Travelers* framework.

Section 506 does not disallow unsecured claims because it does not address them. Section 506 is entitled "Determination of secured status." As explained by the Bankruptcy Court, it "is not concerned with the question of claim *allowance*. . . . [but] the '[d]etermination of secured status' and what may be included in a secured claim." Pet. App. at 36a (citing *In re SNTL Corp.*, 380 B.R. at 220). If Congress had intended to

disallow unsecured claims, the more natural location would have been § 502, entitled "Allowance of claims or interests." *See In re SNTL Corp.*, 571 F.3d at 842–43.

Section 506(b) does not address unsecured claims at all, let alone whether or not unsecured claims for attorneys' fees are allowed. Because it does not "clearly and expressly" compel disallowance, these fees are allowed. *See Travelers*, 549 U.S. at 452 ("claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed").

B. The Code permits contingent prepetition claims.

Petitioner urges that post-petition fees should not be allowed because of § 502(b)'s requirement that the amount of a claim be fixed as of the filing date of the petition. This argument is unavailing. The statute requires that claims be valued as of the petition date, not that post-petition events be entirely disregarded. Courts routinely consider post-petition events affecting the value of an unsecured claim, such as the outcome of litigation for claims that are the subject of ongoing adversary proceedings. *See* 6 Alan N. Resnick & Henry J. Sommer, *Collier Bankruptcy Practice Guide* ¶ 92.07[2], 92-15–92-17 (2009) ("Because the Bankruptcy Code permits the bankruptcy court to adjudicate all sorts of disputed, contingent and unliquidated claims, the proponent of a [Chapter 11 reorganization] plan must reserve and find a mechanism for distribution to such claimants.") (footnote omitted). Moreover, the Code expressly defines "claim" to include contingent claims, 11 U.S.C. § 101(5), and courts regularly

determine the value of those claims based on subsequent events, *see* Resnick & Sommer, *supra*, ¶ 92.07[2].

Thus, if the creditor's right to collect arose prepetition, "the fact that the fees were actually incurred during the post-petition period is not relevant to the determination of whether the creditor has an allowable prepetition claim for the fees." Pet. App. at 39a (citation omitted). This comports with the Code's definition of claim which specifically includes "contingent" rights to payment. 11 U.S.C. § 101(5) (2006). Petitioner's position reads contingent claims out of the Code and renders § 502(c)—which permits courts to estimate the value of contingent claims—inutile.

Petitioner accuses the Second Circuit of rendering §§ 502(e)(2), (g), (h), and (i) "superfluous" by describing a prepetition obligation that becomes fixed post-petition as an allowable "contingent claim." Pet. at 11–12. These subsections, however, each serve their own unrelated purposes. They do not, as Petitioner suggests, dictate whether claims that arise post-petition should be allowed or disallowed, but rather cross-reference to other sections of the Code (including § 502(b)) for such determinations. The only common aspect between them is that they impose prepetition status on various types of claims that are not fixed at the moment of filing, as would typically be the case under § 502(b).

Subsection 502(e) addresses claims for reimbursement and contribution when a creditor is liable with the debtor to another party. Section 502(e)(1) disallows such claims to the extent

they are contingent, while § 502(e)(2) permits them once they become fixed and provides that they will be deemed prepetition claims upon allowance. Since F&D's claim for attorneys' fees is a direct claim against the bankruptcy estate, this provision is not applicable.

Subsection 502(g) governs the treatment of a contract claim after the contract has been rejected and provides that it will be treated as a prepetition claim. Subsection 502(h) deals with another kind of post-petition event: it provides that allowed claims arising from recovery of property by the trustee should be treated the same as if the claim had arisen before the filing date of the bankruptcy petition. Finally, § 502(i) accords prepetition status to a tax claim entitled to priority under § 507(a)(8), regardless of when the tax became payable.

These exceptions require prepetition status for certain claims when they are not fixed until after the petition date. The prepetition status of F&D's claim for attorneys' fees, however, is not in question. For that reason, the Second Circuit's allowance of F&D's prepetition claim for post-petition attorneys' fees as a contingent claim does not affect any of the cited subsections, let alone render them superfluous.

C. Petitioner's remaining arguments are unavailing.

Petitioner's two remaining arguments do not warrant much discussion. As the Second Circuit clarified, this Court's decision in *Timbers*, 484 U.S. 365, addresses the express prohibition on "unmatured *interest*" in § 502(b)(2), and finds that § 506(b) provides an exception for oversecured

creditors to the extent of their security. 484 U.S. at 373–74. As such, *Timbers* is inapposite.

Finally, the countervailing policy arguments have negligible import in light of the Code's clarity and this Court's guidance in *Travelers*.

III. THIS COURT'S INTERVENTION IS UNNECESSARY.

Petitioner envisions that, without another decision on attorneys' fees from this Court, forum-shopping will ensue. Pet. at 9–10. The petition presents no evidence, however, to support this fear. In fact, forum shopping is very unlikely. All circuits that have addressed this issue after *Travelers* are in conformity. Indeed, as noted above, no circuit court has a holding to the contrary. Moreover, a debtor is unlikely to select a forum just to avoid a general unsecured claim for fees. Fees are likely to be less than primary liabilities, and general unsecured claims often receive only cents on the dollar. It would not make sense to select a forum on this basis.

This petition does not present either a risk of forum-shopping or a live conflict for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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